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24 UNITED STATES DISTRICT COURT
25 EASTERN DISTRICT OF WASHINGTON

26 HER MAJESTY THE QUEEN IN RIGHT
27 OF CANADA AS REPRESENTED BY
THE MINISTER OF AGRICULTURE
AND AGRI-FOOD. a Canadian
governmental authority,

Plaintiff,

VAN WELL NURSERY, INC. a
Washington Corporation, MONSON
FRUIT COMPANY, INC., a Washington

No. 2:20-CV-00181-SAB

DEFENDANTS' RESPONSE TO
PLAINTIFF'S STATEMENT OF
ADDITIONAL FACTS PURSUANT
TO LCR 56(c)(1)(A)

1 Corporation, GORDON GOODWIN, an
2 individual, and SALLY GOODWIN, an
3 individual

4 Defendants.

5 VAN WELL NURSERY, INC., a
6 Washington Corporation, MONSON
7 FRUIT COMPANY, INC., a Washington
8 Corporation, GORDON GOODWIN, an
9 individual, and SALLY GOODWIN, an
10 individual,
11 ,

12 Counter-Plaintiffs,

13 HER MAJESTY THE QUEEN IN RIGHT
14 OF CANADA AS REPRESENTED BY
15 THE MINISTER OF AGRICULTURE
16 AND AGRI-FOOD, a Canadian
17 governmental authority, and
18 SUMMERLAND VARIETIES
19 CORPORATION, a Canadian
20 Corporation,

21 Counter-Defendants.

AAFC's Additional Material Facts and Supporting Evidence	
1. SVC/PICO bought Van Well's inventory of "Glory" trees for destruction in 2014. Supporting Evidence: Declaration of Nick Ibuki ("Ibuki Decl."), ¶ 3, Ex. 1 (P. Van Well Dep. Ex. 17).	Undisputed.



2. In 2014, SVC was negotiating with Van Well to stop additional propagation and selling of “Glory” until the identity of Glory was confirmed.

Undisputed.

Supporting Evidence:

Declaration of Jennifer Bennett (“Bennett Decl.”), Ex. 1 (VW002761-62 (“We will not sell or deliver any Glory cherry trees until after our meeting with Mr. Carlson.”)); Ex. 2 (SVC0000218 (“I spoke to Peter Van Well 1 today. He



1 has agreed to not allow any
2 delivery of Glory/Staccato
3 until the determination of the
4 variety is proven.”)); Ex. 3
5 (VW002830 (“Glory will not
6 be mentioned in any
7 catalogue published by Van
8 Well and will not offer the
9 variety for sale.”)); Ibuki
10 Decl. ¶4.

15 3. On July 29, 2015, Van
16 Well informed SVC that it
17 was going to rescind its
18 agreement with Goodwin.
19 **Supporting Evidence:**
20 Ibuki Decl., ¶6; Declaration
21 of Goewin Demmon
22 (“Demmon Decl.”), ¶4, Ex. 1
23 (SVC0000318).

Undisputed.



1 2 3 4 5 6 7 8	4. On July 30, 2015, AAFC learned that Van Well intended to rescind its agreement with Goodwin. Supporting Evidence: Demmon Decl., ¶ 4, Ex. 1.	Undisputed.
9 10 11 12 13 14 15 16 17 18	5. On July 31, 2015, Van Well formally terminated its Glory agreement with Mr. Goodwin. Supporting Evidence: Bennett Decl., Ex. 5 (VW000165-66).	Undisputed.
19 20 21 22 23 24 25 26	6. On December 18, 2015, SVC's lawyer sent Van Well's lawyer a letter that stated, "Our client understands your letter to mean that Van Well is not	Undisputed.



1 going to be marketing any
2 Goodwin (Glory) cherry trees
3 going forward and that it has
4 either returned or disposed of
5 all Glory trees in its
6 possession so that it will be
7 neither selling or distributing
8 Glory in the future...given
9 your confirmation that Van
10 Well has now terminated its
11 relationship with respect to
12 the Glory trees, our client is
13 willing to consider that past
14 issues with Van Well Nursery
15 concerning Glory trees are
16 now resolved...”

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22 **Supporting Evidence:**

23 Bennett Decl., Ex. 4
24 (SVC0000596-598).
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1 2 3 4 5 6 7 8 9 10	7. In 2016, Van Well represented to growers that it “no longer sells the [Glory] variety.” Supporting Evidence: ECF 433, Ex. E; Ibuki Decl., ¶8.	Undisputed.
11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27	8. SVC/PICO and AAFC understood that the Glory dispute was resolved (i.e., Glory would no longer be propagated or sold). Supporting Evidence: Demmon Decl., ¶¶ 4-5; Ibuki Decl., ¶ 8; Bennett Decl., Ex. 4 (SVC0000596).	Disputed and immaterial. Whether AAFC subjectively believed that the issue was “resolved” is irrelevant because there was no written agreement settling the matter. RCW 4.16.280 (“No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless it is contained in some writing signed by the party to be charged”). Nor does AAFC identify sufficient evidence showing that Defendants agreed the matter was settled. Finally, SVC and AAFC abandoned whatever rights they had to own Glory trees planted as of 1/20/2016. ECF #433, Ex. D (“<u>the trees may remain in your orchards</u>”)



1 9. In March 2017, Dr.
2 Dhingra published his faulty
3 study, the Hewitt Paper,
4 concluding that Glory and
5 Staccato are distinct varieties
6 because Glory *may* be a sport
7 of Staccato®.

8
9
10 **Supporting Evidence:**

11 Declaration of Sean Beirnes
12 (“Beirnes Decl.”), ¶¶ 3-5, Ex.
13 1 (SVC0001125).
14
15

Undisputed as to publication date. Disputed as to
characterization of it as “faulty.” Dr. Dhingra’s
study remains the only published and peer-
reviewed study showing that Glory is a distinct
variety from Staccato.

1 10. On June 8, 2017, Van
2 Well emailed SVC/PICO: “I
3 just wanted to give you guys
4 a heads up that VAN WELL
5 NURSERY is proceeding
6 with the Glory cherry variety,
7 which has a U.S. Plant Patent
8 and a study showing DNA
9 evidence that it is a distinct
10 variety.... We will be
11 budding trees in August for
12 delivery Spring 2019 and
13 using the name Glory and
14 images of the fruit in our
15 advertising.”

16 **Supporting Evidence:**
17 Beirnes Decl., ¶ 6, Ex. 2
18 (VW002751).
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Undisputed.

11. Prior to June 8, 2017, AAFC did not know and had no reason to know of any potential claims against Van Well.

Supporting Evidence:

Beirnes Decl., ¶¶ 6-7;
Demmon Decl., ¶ 6.

Disputed and immaterial. Whether AAFC subjectively believed that the issue was “resolved” is irrelevant because there was no written agreement settling the matter. RCW 4.16.280 (“No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless it is contained in some writing signed by the party to be charged”). Nor does AAFC identify sufficient evidence showing that Defendants agreed the matter was settled. Finally, SVC and AAFC abandoned whatever rights they had to own Glory trees planted as of 1/20/2016. ECF #433, Ex. D (“the trees may remain in your orchards”)

12. In the Fall of 2017, SVC notified AAFC that there may be an issue with Van Well Nursery and Glory.
Supporting Evidence:
Beirnes Decl., ¶ 7; Demmon Decl., ¶ 6.

Undisputed.

1 13. In October 2017, Van
2 Well informed Mr. Beirnes of
3 SVC that Van Well had
4 budded Glory trees for
5 delivery in 2018 and 2019,
6 with 6,000 trees going to
7 Monson in 2018.
8
9 **Supporting Evidence:**
10
11 Beirnes Decl., ¶ 8.
12

Undisputed.

13 14. On February 2, 2018,
14 SVC/PICO emailed Van Well
15 stating that, even based on the
16 results of the Hewitt Paper,
17 AAFC owns the rights in
18 Glory and it was
19 “imperative to us that
20 [Van Well] not deliver
21 [Glory] trees.”
22
23 **Supporting Evidence:**
24
25
26

Undisputed.

1 Beirnes Decl., ¶ 9, Ex. 3
2
3 (SVC0000665-678);
4 Demmon Decl., ¶ 7.
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9 15. In late February to early
10 March of 2018, SVC
11 confirmed with Van Well
12 Nursery that the 6,000 Glory
13 nursery trees would be
14 delivered to Monson.
15
16

17 **Supporting Evidence:**
18 Beirnes Decl., ¶ 10.
19

Undisputed.

20 16. In March of 2018, AAFC
21 learned for the first time that
22 Monson would be the buyer
23 of the Glory trees from Van
24 Well, to be delivered that
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Disputed, unsupported, and irrelevant. SVC was aware of Monson's involvement with packing Glory for others by August 2014 based on an email from 2014 informing Nick Ibuki that a grower named Joe Wiggs was taking his Glory to "Monson Fruit in Selah." ECF #412 (Tr. Vol. 1), at 132:15-

1 Spring.

2 **Supporting Evidence:**
3 Demmon Decl., ¶ 9.
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24. Mr. Ibuki testified he would have seen this
email, but “it probably wouldn’t have registered in
the slightest” that Monson was packing Glory in
2014. *Id.*
Moreover, the Hewitt Paper published in March
2017 (*see supra* at SAF ¶9), and it doesn’t matter if
AAFC was subjectively unaware because a plaintiff
has a duty to investigate. *See Newell v. Inland*
Publ’ns Inc., No. 2:23-CV-00025-SAB, 2024 U.S.
Dist. LEXIS 57005, at *7, 2024 WL 1337177 (E.D.
Wash. Mar. 28, 2024) (explaining that
“constructive knowledge triggers the statute of
limitations”). ““The plaintiff is deemed to have had
constructive knowledge if it had enough
information to warrant an investigation which, if
reasonably diligent, would have led to discovery of
the [claim].””

1 17. On March 26, 2018,
2
3 AAFC sent Van Well a letter
4 formally demanding that Van
5 Well not sell and distribute
6 Glory.
7

8 **Supporting Evidence:**

9 Demmon Decl., ¶ 8, Ex. 3.
10
11 (AAFC0000685-686).

Undisputed.

12 18. March 2018 was the first
13 time AAFC learned that
14 Monson had any role or
15 involvement with Glory.
16

17 **Supporting Evidence:**

18 Demmon Decl., ¶¶ 9, 11.
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Disputed, unsupported, and irrelevant. SVC was aware of Monson's involvement with packing Glory for others by August 2014 based on an email from 2014 informing Nick Ibuki that a grower named Joe Wiggs was taking his Glory to "Monson Fruit in Selah." ECF #412 (Tr. Vol. 1), at 132:15-24. Mr. Ibuki testified he would have seen this email, but "it probably wouldn't have registered in the slightest" that Monson was packing Glory in 2014. *Id.*

Moreover, the Hewitt Paper published in March 2017 (*see supra* at SAF ¶9), and it doesn't matter if

AAFC was subjectively unaware because a plaintiff has a duty to investigate. *See Newell v. Inland Publ'ns Inc.*, No. 2:23-CV-00025-SAB, 2024 U.S. Dist. LEXIS 57005, at *7, 2024 WL 1337177 (E.D. Wash. Mar. 28, 2024) (explaining that “constructive knowledge triggers the statute of limitations”). “The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [claim].”

19. On April 5, 2018, Mr. Beirnes from SVC spoke with Chris Monson by phone to confirm whether Monson was in fact the intended recipient of Glory trees from Van Well, and to notify Monson that 1) the identity and ownership of Glory was in dispute between AAFC and Van Well, 2) Van Well possessed Staccato® pursuant to an agreement with AAFC, 3) AAFC owns Staccato® and any sport of Staccato®.

Supporting Evidence:

Beirnes Decl., ¶¶ 11-13, Ex. 4 (SVC0000352).

Undisputed, irrelevant, and shows prejudice. Had Anyone at SVC or AAFC notified Monson before he started planting his own orchards in 2016, it would have been able to avoid planting. A lawsuit in 2020 puts his decision to plant four years earlier at risk, and Monson never would have taken that risk had AAFC/SVC acted sooner.

1 20. During their April 5, 2018
2
3 call, Mr. Monson informed
4 Mr. Beirnes that he intended
5 to purchase Glory trees from
6 Van Well but that he had not
7 yet taken delivery of any
8 Glory trees and would talk to
9 Van Well about the
10 Glory/Staccato® issue.

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12 **Supporting Evidence:**

13 Beirnes Decl., ¶ 12.
14
15

Undisputed.

16 21. On April 25, 2018, Mr.
17 Beirnes followed up with
18 Monson to see whether
19 Monson decided to plant
20 Glory.
21

22 **Supporting Evidence:**

23 Beirnes Decl., ¶ 14, Ex. 4
24 (SVC0000352).
25
26

Undisputed.



22. On May 31, 2018,
Monson informed SVC that it
had already “planted the
[Glory] trees and will wait to
see who and what the
royalties will be paid too....”

Supporting Evidence:

Beirnes Decl., ¶¶ 15-16, Ex. 4
(SVC0000352); Demmon
Decl., ¶10, Ex. 4
(SVC0000352).

Undisputed.

23. On May 31, 2018, SVC
informed AAFC that Monson
received and planted Glory
trees received from Van Well.

Supporting Evidence:

Beirnes Decl., ¶ 16, Ex. 4
(SVC0000352); Demmon

Undisputed.

Decl., ¶ 10, Ex. 4
(SVC0000352).

24. Prior to May 31, 2018,
AAFC did not know and had
no reason to know of any
potential claims against
Monson.

Supporting Evidence:

See id.

Disputed, unsupported, and irrelevant. SVC was aware of Monson’s involvement with packing Glory for others by August 2014 based on an email from 2014 informing Nick Ibuki that a grower named Joe Wiggs was taking his Glory to “Monson Fruit in Selah.” ECF #412 (Tr. Vol. 1), at 132:15-24. Mr. Ibuki testified he would have seen this email, but “it probably wouldn’t have registered in the slightest” that Monson was packing Glory in 2014. *Id.*

Moreover, the Hewitt Paper published in March 2017 (*see supra* at SAF ¶9), and it doesn’t matter if AAFC was subjectively unaware because a plaintiff has a duty to investigate. *See Newell v. Inland Publ’ns Inc.*, No. 2:23-CV-00025-SAB, 2024 U.S. Dist. LEXIS 57005, at *7, 2024 WL 1337177 (E.D. Wash. Mar. 28, 2024) (explaining that “constructive knowledge triggers the statute of limitations”). “The plaintiff is deemed to have had

1		constructive knowledge if it had enough
2		information to warrant an investigation which, if
3		reasonably diligent, would have led to discovery of
4		the [claim].”
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11	25. In 2019, Dr. Matthew	Undisputed.
12	Settles was hired to analyze	
13	the DNA sequence data from	
14	the Hewitt Paper upon which	
15	Defendants relied to support	
16	that Glory was different than	
17	Staccato®, to independently	
18	validate the findings reported	
19	in the paper.	
20	Supporting Evidence: Bennett	
21	Decl., Ex. 6 (Settles	
22	Rpt.), ¶ 33.	
23		
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1 2 3 4 5 6 7 8 9 10 11 12	26. On July 5, 2019, Dr. Settles finished his analysis and concluded that the Hewitt Paper did not support that Glory and Staccato® are distinct genotypes. Supporting Evidence: Bennett Decl., Ex. 7 (PTX72).	Undisputed as to when Dr. Settles finished his analysis. Disputed as to whether his conclusions were sufficient to call into question the results published in the peer-reviewed Hewitt paper.
13 14 15 16 17 18 19	27. On August 22, 2024, the Court concluded that Glory is, in fact, Staccato®. Supporting Evidence: ECF 424.	Undisputed.
20 21 22 23 24 25 26 27	28. Prior to June 8, 2017, SVC/PICO provided Defendants with multiple studies demonstrating that Glory and Staccato® are the same.	Undisputed as to when SVC/PICO provided results of their in-house, non-peer-reviewed studies. Disputed as to whether these studies showed that Staccato and Glory were the same variety and disputed to the extent that this suggests SVC/PICO or AAFC provided Defendants with data in support

Supporting Evidence:

ECF 424 ¶¶ 72-105, 129.

of these alleged studies.

29. On June 25, 2014, Dr. Dhingra told Van Well that he met with Dr. Wiersma and discussed Dr. Wiersma's conclusion that "Glory" and Staccato® are the same, that Dr. Wiersma's DNA testing of "Glory" and Staccato® was more comprehensive than his own, and that he did not have access to sufficient resources and information to reach as comprehensive a

result as Dr. Wiersma.

Supporting Evidence:

ECF 424, ¶ 105.

Disputed and irrelevant to this motion.



30. Dr. Dhingra told Van Well that, as of June 2014, his DNA studies comparing “Glory” and Staccato® were not as comprehensive as AAFC’s studies because he had not used a sequencing based approach.

Supporting Evidence:

ECF 424, ¶ 129.

Disputed and irrelevant to this motion.

31. Prior to June 8, 2017, Pete Van Well 1 twice acknowledged that the Glory tree planted at Goodwin’s orchard looked like Staccato®.

Supporting Evidence: ECF 424, ¶¶ 37-40.

Undisputed and irrelevant.

32. Mr. Ibuki from SVC did not know that, as early as August 2014, Monson had packed Glory fruit grown by others.

Supporting Evidence:

ECF 412 (Tr. Vol. I), at 129:16-19 (“Q. Is that because you didn’t know that Monson Fruit had been packing Glory since 2014? A. I definitely did not know that they’d been packing since 2014.”).

Disputed and not supported. AAFC cites Mr. Ibuki’s testimony *before* he was shown an email from 2014 informing him that a grower named Joe Wiggs was taking his Glory to “Monson Fruit in Selah.” ECF #412 (Tr. Vol. 1), at 132:15-24. Mr. Ibuki testified he would have seen this email, but “it probably wouldn’t have registered in the slightest” that Monson was packing Glory in 2014. *Id.*

33. AAFC did not know that, as early as August 2014, Monson had packed Glory fruit grown by others.

Supporting Evidence:
Demmon Decl., ¶ 11.

Disputed, unsupported, and irrelevant. SVC was aware of Monson’s involvement with packing Glory for others by August 2014 based on an email from 2014 informing Nick Ibuki that a grower named Joe Wiggs was taking his Glory to “Monson Fruit in Selah.” ECF #412 (Tr. Vol. 1), at 132:15-

24. Mr. Ibuki testified he would have seen this email, but “it probably wouldn’t have registered in the slightest” that Monson was packing Glory in 2014. *Id.*

Moreover, the Hewitt Paper published in March 2017 (*see supra* at SAF ¶9), and it doesn’t matter if AAFC was subjectively unaware because a plaintiff has a duty to investigate. *See Newell v. Inland Publ’ns Inc.*, No. 2:23-CV-00025-SAB, 2024 U.S. Dist. LEXIS 57005, at *7, 2024 WL 1337177 (E.D. Wash. Mar. 28, 2024) (explaining that “constructive knowledge triggers the statute of limitations”). “The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [claim].”

34. SVC understood that Van Well Nursery was the only party responsible for propagating and selling Glory trees to growers on behalf of Gordon Goodwin.

Supporting Evidence:

Ibuki Decl., ¶5.

Disputed and irrelevant. It doesn't matter if AAFC was subjectively unaware because a plaintiff has a duty to investigate. *See Newell v. Inland Publ'ns Inc.*, No. 2:23-CV-00025-SAB, 2024 U.S. Dist. LEXIS 57005, at *7, 2024 WL 1337177 (E.D. Wash. Mar. 28, 2024) (explaining that “constructive knowledge triggers the statute of limitations”). “The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [claim].”

35. SVC is not an agent of AAFC.

Supporting Evidence:

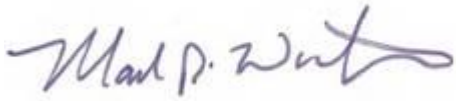
ECF Nos. 42-1, 42-2, 42-3, and 42-4.

Disputed and irrelevant. AAFC had an independent duty to investigate. *See Newell v. Inland Publ'ns Inc.*, No. 2:23-CV-00025-SAB, 2024 U.S. Dist. LEXIS 57005, at *7, 2024 WL 1337177 (E.D. Wash. Mar. 28, 2024) (explaining that “constructive knowledge triggers the statute of limitations”). “The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if

reasonably diligent, would have led to discovery of
the [claim].”

DATED this 12th day of March 2025.

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9 Attorneys for Defendants Van Well
10 Nursery, Inc.



CERTIFICATE OF SERVICE

I, Mark P. Walters, attest that I am over the age of 18 and not a party to the action. I hereby certify that on March 12, 2025, I caused the foregoing document to be served on all counsel of record using the Court's ECF filing system.

/s/ Mark P. Walters

